THE NORTHERN SECURITIES DECISION.

A REVIEW.

It is not the purpose of this article to attempt a criticism of the opinions recently rendered by the judges of the Federal Supreme Court in the case of the *Northern Securities Company* v. *The United States,* nor to discuss the relative merits of the grounds upon which these opinions are based. The questions involved and the controlling arguments affecting them have been so thoroughly canvassed as to render their further discussion of questionable value. It has seemed worth while, however, to endeavor to present in a concise manner a résumé of the opinions delivered in this case, to analyze the different attitudes assumed by the judges, and to consider the probable effect of the decision upon future litigation.

In view of the literature already existing on the subject and the familiarity of the readers of the AMERICAN LAW REGISTER with the case, the facts involved need not be reviewed, nor need this article be burdened with the citation of numerous authorities. The principal contributions to the literature on the subject are found in the note,[1] and it

[1] *The Northern Securities Case and the Sherman Anti-Trust Act,* by Prof. C. C. Langdell, 16 Harv. Law Rev. 539; *The Importance of the Merger Decision* (referring to the decision in the lower court), Editorial by "B. W.," 16 Harv. Law Rev. 583; *The Northern Securities Company Case; A Reply to Professor Langdell,* by Hon. Daniel H. Chamberlain, LL.D., 13 Yale Law Journal, 57; *The Decision in the "Merger Case"* (referring to the decision in the lower court), a pamphlet by J. L. Thorndike of the Boston Bar, published by Little, Brown & Co.; *The Merger Case and Restraint of Trade,* by Sir Frederick Pollock, 17 Harv. Law Rev. 151; *The Power of Congress over Combinations Affecting Interstate Commerce,* by Augustine L. Humes, 17 Harv. Law Rev. 83; *The Northern Securities Case under a New Aspect* (a review of Mr. Thorndike's pamphlet), by Prof. C. C. Langdell, 17 Harv. Law Rev. 41; *Considerations on the State Corporation in Federal and Interstate Relations, The Northern Securities Cases,* by Carman F. Randolph, 3 Columbia Law Review, 168, 221, 305, a series of three articles, dealing separately with "The United States Suit," "The Washington Suit," and "The Minnesota Suit."

is sufficient to say that the case involves the legality under the Sherman Anti-trust Act[2] of the transfer of stock by stockholders in two competing corporations engaged in interstate commerce to a corporation incorporated to acquire such stock, where the stock so transferred constituted a majority of shares in each corporation.

The dissenting opinions will be first considered in order that it may be seen more readily whether the so-called opinion of the court rendered by Mr. Justice Harlan answers the contentions of the minority. In view of the brevity of Mr. Justice Holmes's opinion and its lack of complexity we shall turn first to it.

On the threshold of this opinion emphasis is laid on the fact that the provisions of the Sherman Anti-trust Act apply to "*every* contract, combination," etc., and that the principles adopted must be applicable, no matter how limited the operation of such contract, combination, etc., may be. The dissent is then rested on the ground that these provisions of the Sherman Act "could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest—an arrangement which leaves the parties without external restriction."[3] Mr. Justice Holmes reaches this conclusion by holding that the Sherman Act intended to forbid contracts, combinations, etc., which at the common law were considered in restraint of trade. These, he points out, were of two classes: first, contracts made with a stranger "which wholly or partially restrict the freedom of the contractor in

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[2] Act of Congress of July 2, 1890, 26 Stat. 209. A concise statement of the leading cases decided under this Act prior to the present decision will be found in an article by Wm. F. Dana on *The Supreme Court and the Anti-trust Act,* 16 Harv. Law Rev. 178.

[3] *The Northern Securities Company et al.* v. *United States, Opinion of the Court, with Concurring and Dissenting Opinions, Delivered March 14, 1904:* Pamphlet published by the Clerk of the Supreme Court of the United States, p. 66. References to the various opinions of the judges in this case will in this article be made to this pamphlet, since the case has not as yet been published in the reports. This pamphlet will hereafter be cited as Pamphlet Report of *The Northern Securities Co.* v. *United States.*

carrying on that business as otherwise he would." [4] This class is illustrated by the familiar instance of a person agreeing not to engage in a certain business: "The objection of the common law to them was primarily on the contractor's own account." [5] The second class of cases regarded as restrictions of trade at the common law included, it is held, "combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large." [6] To prevent combinations having such tendency from becoming effective was, it is said, a powerful factor in bringing about the passage of the Sherman Act, since it was feared at that time that the combinations which had been effected, and which were then in progress of formation, would eliminate the small producer and manufacturer from business. Proceeding on this theory Mr. Justice Holmes holds that "so far as that phrase [referring to the prohibition of contracts and combinations in restraint of trade] goes, it is lawful to abolish competition by any form of union." [7] He refers in enforcement of this opinion to the obvious fact that partnerships and single corporations have, up to the present decision, not been considered as violating the provisions of the act even though, as in the case of a railroad running through a gorge too narrow to permit more than one track, the effect of the incorporation of individuals conferred upon them a practical monopoly. Stating his view in somewhat different fashion, but still enforcing the same idea that the whole question depends upon the common law view of what constitutes a contract in restraint of trade, he says: "In

[4] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 65.
[5] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 65.
[6] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 65.
[7] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 67.

my opinion, there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on." [8]

This in brief is a complete statement of his attitude, and in it concur the Chief Justice, Mr. Justice White, and Mr. Justice Peckham, the three other dissenting justices.

Turning now to the dissenting opinion of Mr. Justice White, we find the case considered as depending entirely upon a question vitally different, viz., whether Congress has the power to regulate and control the acquisition and ownership of stock in a state corporation. Thus he says: "The sole question is whether the ownership of stock in competing railroads does involve interstate commerce." [9] Further, in opening his discussion of the case he declares that, "The proposition upon which the case for the Government depends, then, is that the ownership of stock in railroad corporations created by a state is interstate commerce, wherever the railroads engage in interstate commerce." [10] In view of this attitude towards the case he devotes almost his entire opinion to an effort to disprove that the ownership of stock in state corporations competing in interstate commerce is itself interstate commerce. With this established it follows in his view that Congress has no power in any instance to regulate such ownership. He and Mr. Justice Holmes therefore approach the question in ways radically different. Mr. Justice White inquires into the fundamental question whether Congress has power under the Constitution to prevent the acquisition by a state corporation of a majority of stock in each of two competing corporations engaged in interstate traffic, while Mr. Justice Holmes confines himself

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[8] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 69.

[9] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 53.

[10] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 39.

to the narrower question whether, assuming that Congress has such power, the Sherman Anti-trust Act forbids by its specific provisions what had been done. To decide this latter question, all that is necessary, he says in the opening part of his opinion, "is to find the meaning of some not very difficult words."[11]

Mr. Justice White, in support of his contention that the ownership of stock in railroads engaged in interstate commerce is not itself commerce, first of all cites the definition of commerce contained in *Gibbons* v. *Ogden*,[12] analyzes it, and finds it inapplicable to the situation presented in this case. Then laying down the proposition that, "If the power [over interstate commerce] embraces ownership, then the authority of Congress over all ownership which, in its judgment, may affect interstate commerce necessarily exists,"[13] he adopts a familiar argument, claiming that this would be an unwarranted extension of Federal power and would permit legislation in interference of state authority far beyond that intended to be vested in Congress. He relies next on the general principle that if such ownership of stock is interstate commerce, it is confided exclusively to the regulation of Congress: consequently, the decisions permitting regulation of it by the states are proof that it is not interstate commerce, since otherwise the states would be entirely excluded from legislation thereon, being deprived either directly by the Constitution of all power over such commerce, or by the fact that in the absence of legislation by Congress, Congress is deemed in consequence of its silence to have intended that the subject shall be free from regulation. Thus he says, discussing the contention that Congress has authority to regulate instrumentalities of commerce, and under this power may prohibit a consolidation of competing railroads engaged in interstate commerce: "Here again it would follow, if the proposition was

[11] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 63.

[12] 9 Wheaton 1, at page 189.

[13] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 42.

adopted, that all the vast body of state legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the states over the subject."[14] It is noteworthy that this is as close as Mr. Justice White comes in any part of his opinion to discussing the question whether such consolidations do *require* a uniform regulation, whether the power over them, where interstate commerce is concerned, may not be concurrent in the states and the Federal Government, just as it is in many other matters.

The case of *United States* v. *E. C. Knight Co.*,[15] the well-known sugar trust case, is cited by him as conclusive authority in support of his contention that the ownership of stock is not commerce. "The parallel," he says, "between the two cases is complete;"[16] and he takes this position notwithstanding that the court in the *Knight Case* especially relied upon the fact that the combination there considered was one not in restraint of commerce directly, but in restraint (if in restraint at all) of manufacture; that "commerce succeeds to manufacture and is not a part of it;"[17] and hence cannot be regulated by Congress because the effect of such restraint upon manufacture would affect commerce, if at all, only indirectly. However, he claims: "There can be no doubt that it was expressly decided in

[14] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 58. See also pages 49 and 50.

[15] 156 U. S. 1.

[16] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 49.

[17] *United States* v. *E. C. Knight*, 156 U. S. at p. 12. Similarly it is said (p. 17): "What the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce."

the *Knight Case* that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.*" [18] It is therefore concluded that Congress is without power to regulate the acquisition and ownership of stock in state corporations.

Three propositions, he says, were so earnestly pressed by the Government as to be deserving of especial consideration.

The first of these is that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce. This of course he admits, but answers that the power to regulate such instrumentalities " is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise." [19]

The second proposition is that the several states are without power to directly burden interstate commerce. This is admitted, but the answer given is the one frequently made in the argument of the case, that the ownership of stock in competing corporations engaged in interstate commerce, if a restraint at all, is such only " by reason of the reflex and remote results of the exertion of the lawful power" [20] thereby acquired. " No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise in the operation of the roads a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership." [21]

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[18] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 55. Even in this general statement it is fair to suggest that the principle should be limited to corporations engaged in manufacture.

[19] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 57.

[20] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 58.

[21] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 59.

The third proposition, which he regards deserving of a special answer, is "that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them." [22] To this it is answered that "this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced." [23] A distinction, he contends, must be drawn between the power of a person *to do* something with property acquired, which he admits may be regulated by government, and his power *to acquire* such property over which the government has no right of control.[24]

In short, then, Mr. Justice White rests his dissent on the proposition that Congress has no power to regulate the acquisition and ownership of stock in state corporations, and that the opinion of the court permits such a regulation. In this view the other dissenting justices concur. Upon two distinct grounds therefore the four minority judges rest their dissent, in the first place regarding Congress as destitute of the power claimed for it, and further contending that even upon the assumption that such power may be exercised by the Federal Government, the Act of July 2, 1890, discloses no intention to exert it.

The judges who unite in affirming the decree of the court below and form the majority of the court in rendering the decision do not find themselves in such entire accord. Mr. Justice Brewer rests his decision upon grounds set forth in a separate opinion, and refuses full assent to the opinion of the other judges with whom he concurs in the result

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[22] Pamphlet Report of *The Northern Securities Co.* v. *United States,* 59.

[23] Pamphlet Report of *The Northern Securities Co.* v. *United States,* 59.

[24] Pamphlet Report of *The Northern Securities Co.* v. *United States,* 61.

reached. This other opinion, in which four judges agree and which is called the opinion of the court, is rendered by Mr. Justice Harlan. In it the learned judge after quoting the Sherman Act at length gives a brief history of the steps which led up to the formation of the Northern Securities Company and of the facts surrounding its incorporation. This statement he develops so as to show that the tendency of events for some years had been to bring the Great Northern and the Northern Pacific Railways closer together in the operation and management of their respective roads, and that the formation of the Northern Securities Company was simply the final step in this evolution. In his view its purpose clearly appears to have been to suppress competition between the roads by unifying their control. He follows this review of the facts with an enumeration of principles of law settled by previous adjudications of the court. Among the most important of these, in their direct application to the present case, are the following: "that railroad carriers engaged in interstate or international trade are embraced by the [Sherman] Act; that *every* combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in *interstate trade or commerce,* and which would *in that way* restrain *such* trade or commerce, is made illegal by the act; that the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;[25] that to vitiate a combination, such as the

[25] An excellent and exhaustive discussion of contracts in restraint of trade is found in the opinion delivered by the present Secretary of War, then Circuit Judge, in *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 277. In connection with this discussion it is of interest to note the development in the decisions of the Supreme Court of the principle that a restriction of competition is a restriction of trade. In the first case, viz., the Sugar Trust case, it was unnecessary for the court to consider what constituted a restraint, since the case was disposed of on other grounds. But Mr. Justice Harlan, dissenting, finds this a necessary part of his opinion and holds (156 U. S. at p. 33): "Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other states or to be carried to other states—a freedom that cannot exist

act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce as to deprive the public of the advantages that flow from free competition." [26] Assuming the attitude towards the development of the Northern Securities Company above pointed out and relying on the proposition that any direct restraint of competition between persons engaged in interstate commerce is a direct restraint of such commerce within the meaning of the Sherman Act, he concludes that the placing of stock of the two corporations in the Northern Securities Company amounted to a combination within the meaning

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if the right to buy and sell is fettered by *unlawful restraints that crush out competition* [italics our own]—affects, not incidentally, but directly, the people of all the states." In the opinion of the court in *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, there is no concise statement of the test of restraint of trade. The decision, however, is in its tenor in support of the theory that a restraint of competition is restraint of trade, since so far as this matter is concerned the court seems satisfied with finding an agreement as to rates between competing railroads. In *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505, involving a situation almost parallel with that in the Trans-Missouri case, the court says: "We think that it [that is, the power of Congress to regulate commerce] extends at least to the prohibition of contracts, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce;" and further at page 577: "The natural, direct, and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of competition, restrains instead of promoting trade and commerce." And finally in *Addyston Pipe Co.* v. *U. S.,* 175 U. S. 211, at page 244: "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made."

[26] Pamphlet Report of *The Northern Securities Co.* v. *United States,* 11.

of the word as used in the act, that such combination, as he has already pointed out, was for the purpose of suppressing competition and consequently is in restraint of trade.

He then considers the contention that what was done amounted to a mere sale of stock and that Congress cannot forbid single individuals from disposing of their stock in state corporations even if such corporations be engaged in interstate and international commerce. He analyzes the position taken by Mr. Justice White, and points out that the contention practically is made that the acquisition and ownership of stock in a state railroad corporation is itself interstate commerce. "This suggestion," he says, "is made in different ways, sometimes in express words, at other times by implication."[27] Referring then to the various forms in which it appears, he continues: "Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; and it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress could control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. . . . What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them."[28] In other words, it is admitted that Congress has the power to regulate interstate commerce, that one valid form of such regulation is prohibiting restraints on such commerce; that the Northern Securities Company is a combination in restraint of competition and therefore in restraint of such commerce;

[27] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 13.

[28] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 13.

that all means necessary for striking down such combination may be exerted by the Government.

Similarly he answers the contention that this was an unauthorized interference with state power by pointing out that the power of Congress to suppress in this particular case a combination restraining interstate commerce being clear, whether or not the state power was interfered with is unimportant in view of the paramount power of the Federal Government. Referring then to the power of the states, which is of course admitted on all sides, to deal with combinations restraining its domestic commerce, he asks, "Is there, then, any escape from the conclusion that, subject only to such restrictions [viz., those found in the Constitution of the United States], the power of Congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce?" [29]

Between this attitude of Mr. Justice Harlan in his opinion, which is designated the Opinion of the Court, and the attitude of Mr. Justice White, there appears what was strikingly in evidence in the arguments of counsel in this case—namely, that the different results reached seem to depend not so much upon different views of legal principles as upon a difference of attitude, or perhaps it may be better stated as a difference of approach, to the questions at issue. Mr. Justice Harlan, following the line of attack made by Attorney-General Knox, develops the history of the Northern Securities Company by finding in each step taken clear evidence of a purpose to unify the control of the two roads and to suppress competition between them. The similarity of the consolidation to the original form of combination between corporations—namely, the placing of the stock of such corporations in the name of a trustee, who thereupon issued trust certificates to the various stockholders and controlled the several companies in their interest—is, of course, rather striking. In this view the Securities Company is re-

[29] Pamphlet Report of *The Northern Securities Co.* v. *United States,* 18.

garded by Mr. Justice Harlan as a mere trustee, and it will be noted that in the above quotation he uses this very word. He relies with special emphasis upon the fact that Mr. Morgan, in his examination at the hearing of the case, spoke of the Securities Company as a "custodian" [30] of the stock. He then finds that just as the stockholders originally transferred their stock to a trustee, so in this case they transferred their stock to the Northern Securities Company; that as in the original case the trustee represented a unified control of the various corporations represented, so here the Securities Company occupied a similar position; that just as in the original case the trustee issued trust certificates, so here the Northern Securities Company issued its own stock. The apparent individuality and autonomy of the original corporations is preserved, but the control of them is centralized and an effective means of suppressing competition is found. The Securities Company in this view becomes a mere step in the combination which existed among the stockholders. This combination antedated the formation of the company and had for its purpose the suppression of competition between the Great Northern Railway and the Northern Pacific Railway, and in devising means to make itself effectual without coming in conflict with settled rules of law organized the Northern Securities Company as a mere agent, a mere instrument in carrying out its purpose. Mere corporate existence in this view gives it no significance, but represents only the attempts of individuals to assume a corporate charter for the purpose of cloaking unlawful acts.

On the other hand, Mr. Justice White approaches the question in an entirely different way. He sees the matter from a view-point quite different and describes the questions as they are presented to him in this special perspective. He discusses the Northern Securities Company as though it were a company formed by individuals who went into the market for the purpose of purchasing stock and

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[30] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 26.

used the corporation merely as the form in which they were to carry on their investment operations. He finds consequently a situation in which a corporation (or individuals acting through its agency) is making an investment in stocks of other corporations; he discovers that whether such corporation may so invest its funds is a matter depending on state law and on its charter of incorporation; that no decision has as yet been made which prevents an individual from acquiring stock in competing corporations; that a corporation stands in substantially the same position, and that the mere acquisition of the stock is not in itself a direct suppression of competition. The striking difference between this attitude and the attitude of Mr. Justice Harlan brings into clear view the fact that Mr. Justice Harlan finds the prime motive of the whole transaction in a desire of competitors to relieve themselves of the effects of competition and an adoption of the Northern Securities Company as a means, a mere instrument, for accomplishing this result, while Mr. Justice White regards the Northern Securities Company as a *bona fide* corporation formed for the purpose of investment and lays no stress on the fact that it was organized by persons originally competing.[31]

Whether in substance there is any difference between the case where a corporation purchases the majority of stock in each of two competing corporations, engaged in interstate commerce, when such corporation is formed by those who are controlling stockholders in the corporations whose stock is purchased, and the case where such purchasing corporation is formed by strangers to the corporations intended to be bought out, may be doubted. However, it seems un-

[31] In this connection should be noted the statement by Mr. Justice Holmes, "The question to be decided is whether, under the Act of July 2, 1890, c. 647 (26 Stat. 209), it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock." Pamphlet Report, 63. Like Mr. Justice White, he fails to adopt the attitude of Mr. Justice Harlan that the corporation was merely an instrument of competitors to carry out the purpose to suppress competition between themselves.

questionable and to be admitted in the arguments and opinions in the present case that if a company had originally built two parallel lines no infringement of the Sherman Act would arise, and it might be urged that the same is true where a company, instead of building such lines, purchases them. On the other hand, the distinction might be made that all the cases heretofore interpreting the Sherman Act and holding it applicable have been cases where the effort was made by persons competing with each other to suppress competition through some understanding, agreement, or combination. This distinction, if valid, would bring the Northern Securities Company within the operation of the Sherman Act in view of the fact that the majority of the court regarded it as an effort on the part of Messrs. Morgan and Hill, representing the controlling powers in the two competing railroads, to escape competition by means of some device and that the device adopted was the instrumentality of corporate existence.

With reference to the difference between the attitude of Mr. Justice Harlan and that of Mr. Justice White it is interesting to note a suggestion made by Sir Frederick Pollock, in an article written by him on "The Merger Case and Restraint of Trade," in the *Harvard Law Review* for January, 1904. He says, referring to the contention that nothing more has happened than a sale to a corporation of shares in another corporation, "If the transaction were a real out-and-out sale, it is difficult to see what fault could be found with it on the point of restraint of trade, which alone concerns us. But has there been a genuine sale? Will the court not see any ground for going behind the form? The Northern Securities Company has, I understand, no property and no funds out of which to pay dividends other than the very railway shares which have been transferred to it; nor does it seek to distribute profits to any persons other than those transferrers. And, if this is so, may it not be held that the transaction, as a sale, is merely colorable, and that in truth it is a device to the effect of enabling the transferrers to retain their beneficial interest in the several railway companies while each of them renounces his indi-

vidual voice and vote as a shareholder? And if that be the correct view of the facts, is not the agreement which leads to such results equivalent to an agreement between several persons engaged in business to surrender their discretion as to the manner in which they shall conduct their business? In other words, is it not an agreement in restraint of trade within the authority of *Hilton* v. *Eckersley* [32] and the recent decision of the Supreme Court of the United States in the *Addyston Pipe & Steel Co.'s Case?*" [33]

There is a striking similarity between the language here used and the following passage from Mr. Justice Harlan's opinion: "It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind." [34] Proceeding as he does on the broad ground that a combination was formed by individual stockholders in competing corporations engaged in interstate commerce for the purpose of suppressing the competition between such corporations; that such suppression of competition branded the combination as in restraint of trade and therefore rendered illegal the formation of a corporation for the purpose of carrying it into effect, it is difficult to decide how much weight may be attached to this consideration to which he adverts that the transfer of stock did not represent a *bona*

[32] 6 E. & B. 47. See also *People* v. *North River Sugar Refining Co.*, 121 N. Y. 582; *State* v. *Standard Oil*, 49 Ohio St. 137; *State* v. *Distillery Co.*, 29 Nebr. 700; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268; *Harding* v. *American Glucose Co.*, 182 Ill. 551 (615).

[33] 175 U. S. 211.

[34] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 26.

fide sale or an investment on the part of the Northern Securities Company. The great importance it may possibly possess is, of course, apparent when it is remembered that in many instances where consolidation has occurred the sale has been made in good faith and with funds actually raised by the purchasing corporation for the purpose of securing the stock of the corporation desired to be controlled. In other words, does this idea that no real sale took place in this case but that there was a mere vesting of control in a single corporation for the benefit of stockholders in two corporations so that competition between them might be suppressed, furnish a limitation on the operation of this decision?[35]

A suggestion closely resembling that made by Sir Frederick Pollock, and set forth by Mr. Justice Harlan, as above indicated, is found in a very clear and suggestive editorial on "The Importance of the Merger Decision," by "B. W.," in the *Harvard Law Review*.[36] The *Northern Securities*

[35] Mr. Justice White deals briefly with this question of the *bona fides* of the sale (Pamphlet Report, 38). He contends that a real consideration passed, but relies more particularly on his general argument that, "If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If, on the contrary, the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress." See in this connection the article by Carman F. Randolph, Esq., on "The Northern Securities Cases" in the March issue of the *Columbia Law Review*, 168. On page 173 he discusses the contention that the sale was merely colorable, taking the position that it was not so in view of the fact that the shares of stock could not be recalled by the vendors and that the vendors had received something entirely different from what they transferred.

Upon this point the language of Attorney-General Knox in his argument before the Supreme Court is also of interest (p. 162): "The failure to observe this distinction—that is, the distinction between an actual *bona fide* sale, and what is nominally a sale but in reality only a cloak under which to accomplish a combination of corporate properties and interests—has sometimes led to confusion of language, if not of thought, in the discussion of trade combinations." Cf. *Noyes on Intercorporate Relations*, sec. 354.

[36] 16 Harv. Law Rev. 583.

Case, he says, does not present the final step in the evolution of corporate combination. There are four clearly defined forms of corporate combination: "First, the pool—a direct agreement between the corporations for their joint operation, *Addyston Pipe Co.* v. *U. S.*, 175 U. S. 211; second, the trust—an indirect arrangement between the shareholders to direct the action of their corporations, *State* v. *Standard Oil Co.*, 49 Ohio State, 147; third, the holding corporation—a central corporation to own the shares of the constituent companies, *Compress Company* v. *Compress Co.*, 70 Miss. 669; fourth, the single corporation—which bought the properties of the former corporations outright, *Richardson* v. *Buhl*, 77 Mich. 632." The *Northern Securities Case* presents the third step. There is a central corporation, but the constituent corporations are left in existence. "The permanent interest in the *Northern Securities Case* must be the bearing of it upon the ultimate holding as to the legality of this final form of consolidation—a central corporation in which the constituent companies go out of existence." It is the relation of the present decision to a possible future decision with reference to the fourth form of combination that makes it of special interest. In the case discussed, which was the lower court's decision, the court refused, he points out, to recognize the fiction of corporate entity in reaching the conclusion that there had been a combination. "That is the portentous thing—this attitude of the court. This decision against the scheme of the holding company is a decision against the combination in fact, that is all. The present form of organization of the great industrial companies is, therefore, not touched by this decision, for the single corporation is not a combination." He comes to the conclusion, therefore, that any danger there may seem to be in this Northern Securities decision is not in the decision itself, but in the possibility of an extension of it.

To the opinion rendered by Mr. Justice Holmes Mr. Justice Harlan pays scant attention; probably he regards it as sufficiently answered by the general considerations made in his decision.

The separate opinion rendered by Mr. Justice Brewer is

of interest in several points of view. In the first place in discussing the right of acquiring property as involved in this case he distinguishes between the individual and the corporation. As to the former he says: "Freedom of action in these respects [managing property and determining the place and manner of its investment] is among the inalienable rights of every citizen;" [37] while in the case of the latter: "A corporation, while by fiction of law recognized for some purpose as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a citizen." [38] In this distinction he finds a satisfactory explanation of the right of an individual to acquire a majority of stock in each of two competing corporations engaged in interstate commerce. In the second place the opinion discloses an abandonment on his part of the stand taken by the court in previous decisions that every contract, combination, etc., whether reasonable or unreasonable, is prohibited by the Sherman Act. He expressly refuses countenance to this view and holds that the Act was intended to prevent only unreasonable restraints of trade and to enforce within the Federal jurisdiction the common law of the several states. Having taken this position, he then finds a combination in the present case, which, in his judgment, is unreasonable, and therefore he concurs in affirming the decree of the lower court.

But the feature of this attitude of Mr. Justice Brewer which renders it particularly interesting is its significance with regard to future adjudications of the court. Between the positions occupied by Mr. Justice Harlan and Mr. Justice White we find a middle ground occupied by Mr. Justice Brewer, who holds that the combination is within the power of Congress and may be within the prohibitions of the Sherman Act and therefore illegal, but that its illegality depends on whether the restraint of interstate trade so arising is reasonable or unreasonable. Consequently, Mr. Justice Brewer in cases similarly constituted practically

[37] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 33.

[38] Pamphlet Report of *The Northern Securities Co.* v. *United States*, 34.

holds the balance of power and can sway the decision to one side or the other by his view of what constitutes a reasonable restraint. If he had regarded the restraint in this case as reasonable he would then, although differing with the minority as to the grounds upon which they rested their opinions, have concurred with them in the result reached, and the Northern Securities Company would have been upheld. The long-established character of certain forms of business enterprises, the entire and long-continued acquiescence of the Government in other well-recognized business operations, danger of unsettling trade by striking at an important support of the commercial structure, countless other considerations, would probably enter into the decision as to whether a restraint is reasonable or unreasonable. In the present case the Northern Securities Company was a device which in the popular understanding was obviously intended to stifle competition and give to the railroads involved in it the opportunity of charging arbitrary rates. It was a device practically new, one which had not grown to be a part of the business life of the community, on which financial interests did not depend for their permanent stability, which could be set aside, as it has proved, without serious inconvenience to the business world, and it may well be that the judge could conclude that such a combination was an unreasonable restraint of trade, without being of opinion that the numerous forms of combination very similar in many respects to this, but differing from it more in their general acceptation by the business world than in technical legal form, would be disallowed.

In its effect, therefore, on future adjudications of the court Mr. Justice Brewer's attitude is perhaps the most significant of any delivered. Whether other judges of the court concur with him in his view that the contracts, combinations, etc., aimed at by the Act should be limited to those which are unreasonable it is impossible to decide. Certainly one of the minority at least has in previous opinions [39] regarded too sweeping the holding that any restraint of interstate trade, whether reasonable or unreasonable, is within the prohibition of the Sherman Act, and it is not im-

possible that since Mr. Justice Brewer has flatly changed his views other members of the court may ultimately come to a similar interpretation of the Act. The attitude of Mr. Justice Holmes is of course an unknown quantity, but since he rested his position in this case upon the common law attitude towards contracts, combinations, and conspiracies in restraint of trade it is not impossible that he may take the further step of holding that the Sherman Act meant to prohibit such combinations as were at the common law unlawful and consequently those which were unreasonable.

The foregoing seem to the present writer to be the decisive principles in the present case. Many questions involved in it are evidently left undecided, and even within its own limits it is in some respects of doubtful import. New questions in many ways related to those raised in the case arise on the very eve of the dissolution of the Northern Securities Company. In endeavoring to conform to the decree of the court the different parties interested have urged two methods of distribution of the assets of the company. The first of these is a re-transfer of the stock held by the Securities Company to the stockholders of such company giving back to such stockholders the shares originally transferred by them to the company. This, except in a partial measure, seems practically impossible in view of the fact that sales of Northern Securities stock have occurred. The second method is to transfer the shares of the two companies to stockholders in the Securities Company, letting the number of Great Northern Railway shares in each case be to the number of Northern Pacific shares as the capital of the Great Northern is to the capital of the Northern Pacific, and letting the number of the combined shares so transferred be determined by the extent of the stockholders' holdings in the Northern Securities Company.

It is interesting to note that, so far as can be gathered from current reports, the latter method of distribution of the stock will lodge in Messrs. Morgan and Hill conjointly

[39] Mr. Justice White in *U. S.* v. *Freight Ass'n,* 160 U. S. 290, and in *U. S.* v. *Joint Traffic Ass'n,* 171 U. S. 505.

control of the two roads in question, while a distribution according to the former plan, assuming that to be possible, will leave Mr. Harriman in control of the Northern Pacific Railway. Since, however, he already controls the Union Pacific, in either case we should be confronted immediately with a combination (?) which might reasonably be expected to bring competition to an untimely end. Suppose, then, control is lodged in Mr. Harriman, will the court make the distinction suggested between the case where a corporation is formed to acquire the majority of the shares in two otherwise competing corporations, and where such shares are held by an individual?

If the pro rata plan of distribution is adopted we may assume that Mr. Morgan and Mr. Hill will conjointly have a controlling influence in each company, and for practical business purposes they in large measure simply take the place of the Northern Securities Company. In such case would an agreement between these two gentlemen to operate each company so as to avoid competition be a violation of the Sherman Act? Where there are two stockholders who conjointly control each of two competing corporations, but neither one of whom has a majority of stock in either corporation, is an agreement between them to control such corporations according to some uniform plan, so as to avoid competition, unlawful under the Northern Securities decision? May two such stockholders agreeing upon a policy for one road adopt the same policy for a second road and thus avoid competition, and if they may, what is the effect of an agreement to do so? Is it within the prohibition of the Act for one of such stockholders to entrust the other with the right to vote his shares, and is the situation affected by a tacit understanding that this other will use the power of control thus acquired to avoid competition?

Assuming that it is possible for two such stockholders to control the two corporations in the ways we have suggested, may they separately issue beneficial certificates against their separate holdings, thus reserving to themselves, separately, control over a minority of stock in each corporation and being able with the co-operation of each

other to muster in every case a majority of stock in each corporation, and thus preserve a unity of control? In other words, assuming that Mr. Hill, when the distribution of the assets of the Northern Securities Company has taken place, will own twenty-five per cent. of the stock of the Great Northern Railway and twenty-five per cent. of the stock of the Northern Pacific Railway, may he, being perhaps unwilling to have so much property in one investment, issue certificates called, let us suppose, the "Hill Certificates," which will entitle the holders thereof to receive in proportions fixed by the certificates the dividends declared on the two stocks? And suppose Mr. Morgan owns thirty per cent. of the stock in each railway, may he issue in a similar manner "Morgan Certificates"? Is there anything invalid in the mere issuance of such certificates, which in each case are issued by a minority stockholder? If not, may Messrs. Hill and Morgan then operate the two companies in harmony? If two persons who are stockholders in each of two corporations competing in interstate commerce may agree with each other as to a policy for the one corporation, may they not agree with each other upon the same policy for the second one, and is the situation changed by the fact that they have issued beneficial certificates against their separate holdings?

These questions are naturally the outcome of the present decision and involve principles closely allied to it. They cannot, however, be regarded as settled by it. Whether the decision is to be extended or limited remains to be seen, but the difference of views which exist between the various members of the court leads to the belief that it represents the high-water mark of judicial decision against corporate combination under the Sherman Act. In this connection the words of Mr. Justice Brewer in closing his opinion have especial significance: "I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation."

Henry Wolf Biklé.